IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 24, 2008 Session

STATE OF TENNESSEE v. DAVID GADDIS

Appeal from the Ducktown Law Court for Polk County
No. 06-015 Amy A. Reedy, Judge

No. E2008-00812-CCA-R3-CD - Filed November 20, 2008

The Defendant, David Gaddis, was convicted in the Ducktown Law Court for Polk County of driving under the influence (DUI) and driving while license suspended, canceled, or revoked. Following a sentencing hearing, the trial court sentenced the Defendant to eleven months and twenty-nine days for the DUI conviction, to be suspended following service of four months in the county jail. The trial court imposed a six-month concurrent term for the conviction for driving while his license was suspended, canceled, or revoked. In this direct appeal, the Defendant (1) challenges the sufficiency of the convicting evidence; (2) claims that the State failed to establish venue and jurisdiction, asserting that the State did not prove the offense occurred within that portion of Polk County under the purview of the Ducktown Law Court; (3) argues that the trial judge erred in permitting certain colorful but crude testimony describing the Defendant as "shit-faced" and by making disparaging comments about defense counsel in front of the jury; and (4) asserts that a sentence of four months confinement was improper. Following a review of the record and the briefs of the parties, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Ducktown Law Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

Randy G. Rogers, Athens, Tennessee, for the appellant, David Gaddis.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Senior Counsel; Jerry N. Estes, District Attorney General; and Sarah Winningham, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On January 9, 2006, a Ducktown Law Court (Third Civil District of Polk County) grand jury returned a four-count indictment against the Defendant, charging him with driving under the influence of an intoxicant (DUI); being a second-time DUI offender; driving while his license was suspended, cancelled, or revoked; and violating the implied consent law.[1] A jury trial was held.

Around 8:40 p.m. on August 13, 2005, Officer Michael Monteith of the Polk County Sheriff's Office was traveling "down Polk County hill[,] . . . on Highway 68 coming out of Copperhill[,]" when he observed a vehicle driving erratically—traveling at a slow rate of speed and crossing over the "fog line" into the emergency lane and then back into the center lane. Officer Monteith initiated a traffic stop and, when the vehicle began to pull over, "it rolled halfway in the . . . right lane and the emergency right at the center of the fog line until it stopped . . . ." Officer Frank Beeam also of the Polk County Sheriff's Office assisted in the stop.

Officer Monteith approached the passenger side of the vehicle due to the amount of traffic on the road. The driver rolled the window down, and Officer Monteith asked for his driver's license. Officer Monteith then noticed that the driver was the Defendant, a local bondsman in the area, whom Officer Monteith knew from prior interactions. The Defendant informed the officer that his driver's license had "expired." Officer Monteith could smell the odor of alcohol coming from the Defendant's vehicle, so he returned to his car and retrieved his recorder to record the incident.[2] Upon returning to the Defendant's car, Officer Monteith said, "'Now, tell me about your license that expired,' and went from there." A copy of the Defendant's Department of Safety driving record was entered into evidence as an exhibit, reflecting the Defendant's license status as "eligible."

After determining that the Defendant's license was expired, Officer Monteith had the Defendant step out of the vehicle. Officer Monteith observed that the Defendant's speech was slurred and that the Defendant was unsteady on his feet, having to steady himself against his car. Officer Monteith was discussing sobriety tests with the Defendant, when the Defendant mentioned that he had previously been involved in a car accident. Officer Monteith then conducted the "diverted attention" test—"counting to four and then having them touch their fingers at the same time." The Defendant was unable to follow Officer's Monteith instructions.

When Officer Monteith asked the Defendant about a field sobriety test, the Defendant moved his hands toward his pockets. Thinking that the Defendant may have something in his pockets, Officer Monteith patted him down. He found some pill bottles in the Defendant's pockets ("Flexeril drugs, Xanexes and Hydrocodones"). Officer Monteith became concerned that the Defendant had been drinking alcohol with these medications and then driving his vehicle. The prescription bottles displayed the Defendant's name on them; the "Flexeril" bottle still had pills in it. Some of the bottles had been filled just five days prior to this incident and were empty or almost empty.

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[1] The State did not proceed on the second-time offender count at trial due to the State's failure to produce a certified copy of the previous DUI conviction. It also appears from the record that the violation of the implied consent law charge was dismissed and not submitted to the jury for its consideration.

[2] This recording was played for the jury but is not included in the record on appeal.

When Officer Monteith was asked if the Defendant exhibited any other signs of intoxication, he responded, "No, other than the strong odor I would consider an alcoholic beverage on his breath, and eyes glassy and bloodshot,[3] and his speech slurred . . . ." Officer Monteith acknowledged that some of the slurred speech and unsteadiness on his feet could have been related to the prior car accident. However, Officer Monteith stated that the Defendant's speech was more slurred than normal.

Moreover, Officer Monteith inquired of the Defendant if he had been drinking, and the Defendant said that he had been drinking. When Officer Monteith asked the Defendant how much alcohol he had consumed, the Defendant stated that "he had had enough" but that he was not drunk and was able to return home. He requested someone give him a ride home.

At this point, the Defendant was placed under arrest. In Officer's Monteith's opinion, the Defendant was intoxicated. Officer Monteith then informed the Defendant of the implied consent law and asked the Defendant to submit to a blood test. The Defendant refused the test and refused to sign the implied consent form. Officer Monteith stated that he had no personal problems with the Defendant.

Officer Beeam transported the Defendant to Benton, and Officer Monteith waited for a wrecker. Finally, Officer Monteith affirmed that all of these events occurred in Polk County.

Officer Beeam also testified at the Defendant's trial. He stated that, on the evening of August 13, 2005, he and Officer Monteith were "monitoring Highway 68 between Ducktown and Copperhill." Officer Monteith initiated a traffic stop, and Officer Beeam went to that location. Upon arriving at Officer's Monteith's location, Officer Beeam observed the Defendant, who he described as "a very intoxicated individual" because he could not stand up on his own, having to lean against the vehicle for support. According to Officer Beeam, the Defendant's speech was very slurred. Officer Beeam confirmed that, when the Defendant was asked if he had been drinking, the Defendant said he "had had enough." Due to the Defendant's back injury, he was only asked to perform the "finger count" sobriety test, which was done poorly.

When asked if he noticed "anything else about [the Defendant's] demeanor or appearance," Officer Beeam responded, "Well, an intoxicated person has a look about them. . . . I call it 'shit-faced.'" According to Officer Beeam, the Defendant had "that look about him" on the evening in question. Officer Beeam witnessed Officer Monteith explaining the implied consent form to the Defendant, and Officer Beeam also affixed his signature to the form.

Officer Beeam testified that he had known the Defendant for thirty-five or forty years. He stated that there was no animosity between to the two of them. He was aware that the Defendant had a speech impediment; however, Officer Beeam stated that it was different that night, that the Defendant's speech was very slurred that night.

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[3] On cross-examination, the officer testified that the Defendant's eyes were not glassy.

The fifty-eight-year-old Defendant testified on his own behalf. He stated that he had lived in the area most of his life and that he had known Officer Beeam since they "were kids[.]" The Defendant testified that he had worked as a bail bondsman in Polk County for a number of years and, as a result of that work, he had known Officer Monteith for sixteen or eighteen years.

The Defendant claimed that he had a speech impediment or difficulty enunciating words during his entire life, which was exacerbated in a stressful situation. He also relayed that he had been in an automobile accident in January 2005, which left him with a broken neck and a "crushed" back. His neck required surgery, resulting in a two-inch screw being placed in his neck. Following his arrest, he had been diagnosed with "a compression fracture of [his] lumbar spine disc[.]"

According to the Defendant, in the months preceding his arrest, he was "disabled for pretty much regular activity[,]" and he had only started leaving his home maybe a week or two prior to his arrest. He had difficulty balancing and walking and regularly leaned on things. On the evening in question, the Defendant went to the Runaway Bar to visit with some friends. He stated that he was at the bar about an hour and a half and drank "nearly" two beers.

At the time of the offenses, he had been prescribed some medication, "[p]ain [p]ills, Hydrocodone and Tramadol." He confirmed that he had pill bottles on his person but stated that he left "most of [his] pills at home." However, the Defendant asserted that he had not taken any medication prior to going to the bar. He decided to go home because he was pain and wanted to go home, lie down, and take some medication.

He denied that his vehicle was weaving, claiming instead that Officer Monteith had some animosity toward him over an election. When asked to explain his statement that he "had had enough," the Defendant replied, "'Enough for me.' I meant enough that I was ready to go home, not that I was drunk but just that I was getting tired." He stated that he did not feel impaired and was not under the influence of any drugs or alcohol.

Regarding a breathalyzer, the Defendant claimed that he stated to Officer Monteith that he would attempt to take the test but that he "had three broke [sic] ribs and . . . didn't know if [he] could or not." He did not recall being asked to take a blood test, but he "may have" said no. Finally, he believed he performed the sobriety test satisfactorily.

On cross-examination, the Defendant asserted that he was straddling the "fog line" because he was attempting to find a safe place to stop. The Defendant admitted that his license had expired the previous November.

Following the conclusion of proof, the Defendant was found guilty of first offense DUI and driving while license suspended, canceled, or revoked. See Tenn. Code Ann. §§ 55-10-401; 55-50-504. A sentencing hearing was held on September 10, 2007. For the DUI conviction, the trial court sentenced the Defendant to eleven months and twenty-nine days. His sentence was to be suspended following service of four months in the county jail, and the Defendant was to be placed on probation. He received a concurrent term of six months for the conviction for driving on a suspended, canceled, or revoked license.

The Defendant filed a motion for new trial, which was denied. The case is now before this Court for our review.

Analysis

I. Sufficiency of the Evidence

First, the Defendant challenges the sufficiency of the convicting evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

The Defendant was convicted of DUI and driving while his license was cancelled, suspended or revoked. Tennessee Code Annotated section 55-10-401(a)(1) makes it unlawful for a "person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state . . . while: (1) under the influence of any intoxicant . . . ." Tenn. Code Ann. § 55-10-401(a)(1). Tennessee Code Annotated section 55-50-504(a)(1) provides that "[a] person who drives a motor vehicle within the entire width between the boundary lines of every way publicly maintained which is open to the use of the public for purposes of vehicular travel . . . or any other premises frequented by the public at large at a time when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor." Tenn. Code Ann. § 55-50-404(a)(1).

The Defendant's DUI sufficiency argument is based upon Officer Monteith's credibility: "The arresting officer, even though he gave reasons why he contended he should arrest the [D]efendant, he acknowledged on cross-examination that all of those reasons could be explained in some other fashion inconsistent with the guilt of the [D]efendant." However, while he states that

the evidence is insufficient with regard to both offenses, the Defendant makes no specific argument as to why the proof was not sufficient to support his driving while license suspended, canceled, or revoked conviction. See Tenn. R. App. P. 27(a) (requiring an argument section setting forth the Defendant's contentions, with citation to authorities and appropriate references to the record).

The proof, in the light most favorable to the State, was legally sufficient to support the Defendant's convictions. Officer Monteith described the Defendant's driving as erratic, stating that he was traveling at a slow rate of speed and crossing over the "fog line" into the emergency lane and then back into the center lane. Officer Monteith initiated a traffic stop, and the vehicle "rolled halfway in the . . . right lane and the emergency right at the center of the fog line until it stopped . . . ." Officer Monteith approached the vehicle and conversed with the Defendant, who informed the officer that his driver's license "expired." At this time, Officer Monteith could smell the odor of alcohol coming from the Defendant's vehicle. A copy of the Defendant's Department of Safety driving record was entered into evidence as an exhibit, reflecting the Defendant's license status as "eligible."

After the Defendant exited the car, Officer Monteith observed that the Defendant's speech was slurred and that the Defendant was unsteady on his feet, having to steady himself against his car. He further stated that he smelled alcohol on the Defendant's breath and that the Defendant's eyes were bloodshot. Officers Monteith stated that the Defendant's speech was more slurred than normal. Officer Beeam, who had known the Defendant for thirty-five or forty years, also noticed the Defendant's slurred speech and saw that the Defendant was unable to stand on his own. Both Officers Monteith and Beeam opined that the Defendant was intoxicated at the time he was driving the vehicle.

According to both Officers Monteith and Beeam, the Defendant performed the "diverted attention" sobriety test poorly. At trial, the Defendant admitted to drinking that evening, stating to the officers that he "had had enough" to drink. He relayed that he was at the Runaway Bar visiting some friends and drank "nearly" two beers. Moreover, the Defendant had several pill bottles in his possession. The Defendant was read the implied consent law and refused a Breathalyzer or blood test.

The jury obviously accredited the testimony of the officers. We reiterate that this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236. Questions about the credibility of witnesses, the weight and value of the evidence, as well as factual issues raised by the evidence are to be resolved by the trier of fact. Id. Accordingly, we conclude there was sufficient evidence to support the Defendant's convictions for DUI and driving while license suspended, canceled, or revoked, beyond a reasonable doubt. The Defendant is not entitled to relief on this issue.

II. Venue and Jurisdiction

On appeal, the Defendant contends that the State adduced insufficient proof of venue and that the trial court lacked jurisdiction to render a judgment of conviction. The Defendant was indicted and tried in the Ducktown Law Court of Polk County. In Polk County, there are two court systems, one being the Law Court of Ducktown and the other the Circuit Court of Polk County. See State v.

Robert Harris, No. 38, 1990 WL 102889, at *1-2 (Tenn. Crim. App., Knoxville, July 25, 1990). Criminal cases arising from the civil districts within the jurisdiction of the Ducktown Law Court, which consists of the Third Civil District of Polk County, are tried in that court. See id.

Specifically, the Defendant argues, "There is no evidence in this record from which a juror could conclude where the boundaries of the Third Civil District are or that the language describing the jurisdiction of the Ducktown Law Court was proved." At the close of the State's proof, the Defendant moved for a directed verdict or judgment of acquittal. The Defendant challenged the venue and jurisdiction of the Ducktown Law Court, arguing as follows:

> [T]he state has not offered in my opinion, you've heard the record, a scintilla of proof with regard to the venue of this specially enacted criminal court which covers a certain portion of Polk County. The General asked one witness if these events occurred in Polk County, but there was not a single question about whether or not this offense occurred within the venue of this particular [c]ourt, the 3rd Civil District of Polk County. And while I understand the law is that they only have to prove venue jurisdiction by a preponderance of evidence they have not asked one question to elicit the appropriate proof of venue in this case . . . .

The following colloquy ensued:

> GENERAL WINNINGHAM: I disagree with that, your Honor. There is a scintilla of proof and certainly more than a preponderance of the evidence, there was testimony from the state's chief witness Deputy Monteith that the stop occurred at the intersection of Highway 68 in the Copperhill-Ducktown area, the center section out here, he said in the Ducktown-Copperhill Highway 68 and 64 intersection, and this is in the 3rd Civil District. That is a preponderance of the evidence and more than a scintilla of proof. The state has reached its burden.
>
> MR. ROGERS: I would say to that, Judge, is there any evidence before this jury to demarcate where the 3rd Civil District is, and the proof is just standard stuff that they—
>
> GENERAL WINNINGHAM: Your Honor, I don't have to mark where the district is and—
>
> THE COURT: I will deny the motion . . . . It certainly described to me where it happened and I knew it was in Ducktown as opposed to coming up the mountain and around the river road is what I started wondering as I was listening as to where did this happen as somebody that doesn't live here. I don't think that he has to use special words. The indictment has to have special words in it and we have to have this in a special place, but I don't think that these officers have to use special words to describe the venue and so I will overrule the motion over counsel's objection.

We note that the Defendant uses the terms venue and jurisdiction interchangeably. However, venue is governed by article I, section 9 of the Tennessee Constitution, which mandates only that a defendant shall have the right to trial "by an impartial jury of the *county* in which the crime shall have been committed." (emphasis added). Here, that county is Polk County. The State met its burden of establishing venue of the crime in this case. Officer Monteith specifically stated that these offenses occurred in Polk County, and there is no genuine dispute that these events occurred in Polk County. Therefore, no constitutional venue right of the Defendant has been abridged. See State v. Harris, 678 S.W.2d 473, 475 (Tenn. Crim. App. 1984).

Rather, the Defendant's argument goes to the jurisdiction of the Ducktown Law Court. He contends that the State was required to establish that these offenses occurred within that portion of Polk County which falls within the exclusive jurisdiction of the Ducktown Law Court, rather than the jurisdiction of the Polk County Circuit Court.

The trial court specifically concluded that these offenses occurred in a civil district under the jurisdiction of the Ducktown Law Court: "It certainly described to me where it happened and I knew it was in Ducktown." Courts frequently take judicial notice of certain areas or places to establish jurisdiction or venue. See 10 David Louis Raybin, Tennessee Practice, Criminal Practice and Procedure § 26:20 (2007); see also Harris, 678 S.W.2d at 475. A state court takes judicial notice of the existence and boundaries of state judicial districts. 22A C.J.S. Criminal Law § 937. Thus, the record demonstrates the jurisdictional authority of the Ducktown Law Court to try the Defendant's case. See Harris, 678 S.W.2d at 475.

The case at bar is, in fact, similar to Harris, a case arising out of Gibson County. Id. at 474-45. The defendant in Harris was indicted and tried in the Gibson County Circuit Court. He argued that the State was required to prove that the offense occurred within the portion of Gibson County under the jurisdiction of the Gibson County Circuit Court, rather than the jurisdiction of the Humbolt Law Court. Id. at 475. In addition to rejecting that defendant's argument for similar reasons previously discussed in this opinion, the Court went on to hold that, where a court exercises general jurisdiction, there is a presumption that no jurisdictional defect exists in the absence of an affirmative showing to the contrary. Id. Just as the defendant in Harris, the Defendant in this case

> has not affirmatively shown, nor, as we have said, does it affirmatively appear from the record, that the [D]efendant was tried in the wrong court. To the contrary, the record satisfactorily shows, as we have indicated heretofore, that the [D]efendant was tried in the proper court. As a matter of fact, the [D]efendant does not even contend that he was tried in the wrong court. His position is merely that the State was required to affirmatively prove that the [Ducktown Law Court] was the court of proper jurisdiction.

See id. at 475-76. The Defendant's issue lacks merit.

III. Improper Comments

The Defendant argues that the trial court failed to properly exercise its discretionary control over the trial by not admonishing Officer Beeam when he described the Defendant as "shit-faced."

The Defendant also challenges statements by the trial court to defense counsel made in front of the jury, referencing defense counsel's stature and girth. The disparaging remarks occurred during the direct examination of Officer Monteith:

> Q. Okay. You found out the driver's license had expired. How long had that been expired?
>
> A. Well, I had to run them through the computer, I think they had been expired—
>
> MR. ROGERS: Objection, your Honor.
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> THE COURT: Sustained.
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> GENERAL WINNINGHAM: Pardon?
>
> THE COURT: Sustained.
>
> GENERAL WINNINGHAM: I didn't hear what his objection was, your Honor.
>
> MR. ROGERS: Hearsay.
>
> THE COURT: It's not relevant. Move on.
>
> Q. Do you know how long the license had expired?
>
> MR. ROGERS: Objection?
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> THE COURT: Sustained.
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> GENERAL WINNINGHAM: Your Honor, may I approach?
>
> THE COURT: You can approach.
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> (GENERAL WINNINGHAM APPROACHED THE BENCH AND THE FOLLOWING TOOK PLACE OUT OF THE HEARING OF THE JURY:)
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> GENERAL WINNINGHAM: Your Honor, we've discussed the records and—
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> THE COURT: Just ask him about the sheet.
>
> GENERAL WINNINGHAM: I just wanted to make sure that I—

THE COURT: Go ahead.

(THIS CONCLUDED THE CONFERENCE AT THE BENCH AND THE FOLLOWING TOOK PLACE IN THE HEARING OF THE JURY:)

MR. ROGERS: Did I miss it?

THE COURT: Yes, you missed it.

MR. ROGERS: I'm sorry, Judge, I've got up as quick as I could.

THE COURT: You've got to move quicker.

MR. ROGERS: I guess I'm getting old, I can't move much quicker.

THE COURT: That's where us little people have an advantage sometimes.

He argues that these statements unfairly prejudiced his trial. The State argues that these issues are waived.

The Defendant failed to make a contemporaneous objection to either of the statements. "Objections must be timely and specific." Tenn. R. Evid. 103, Advisory Commission Comments. Relief is not available to a party who is responsible for, or fails to take action to prevent, an error. Tenn. R. App. P. 36(a). Additionally, the Defendant did not include the trial court's comments about defense counsel as error in his motion for new trial. Generally, issues are waived if they are not presented in a motion for new trial. See Tenn. R. App. P. 3(e). Accordingly, we conclude that the Defendant's assignments of error are waived.

Nonetheless, we find it necessary to admonish the trial court. A bench conference should not have been conducted without defense counsel, and the trial judge's comments to defense counsel following the bench conference, regarding his stature and girth, were inappropriate, particularly when made in front of the jury. See Tenn. R. Sup. Ct. 10, Canon 3B(4), (5). Moreover, the trial court should have preserved the dignity and decorum of the courtroom by admonishing Officer Beeam for his crude and vulgar language. See Tenn. R. Sup. Ct. 10, Canon 3 B(3). However, the record does not establish that the trial court's actions deprived the Defendant of a fair trial.

IV. Sentencing

As his final issue, the Defendant argues that the trial court erred by ordering the Defendant to serve four months of his DUI sentence in confinement. He argues that there were "no aggravating circumstances other than the allegation of driving under the influence and that this record shows a

first offense only and that there was no significant egregious fact taken out of what would be a normal range of punishment for a first offense DUI."[4]

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. See Tenn. Code Ann. § 40-35-302(b). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. See State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the court is required to provide the parties with a reasonable opportunity to be heard as to the length and manner of service of the sentence. See Tenn. Code Ann. § 40-35-302(a). The trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. See Tenn. Code Ann. § 40-35-302(e).

In imposing four months of confinement, the trial court found as follows:

> But the thing that was interesting to me and part of the reason why I will not grant straight probation, but I will grant probation after he serves some time, is for the concern I have about rehabilitation which is what alternative sentencing is for, about [the Defendant] is that I feel like he was untruthful and that sends a message to me that he may not be rehabilitative . . . . He does have a prior history of drinking and driving in the state of North Carolina. While the [c]ourt did not allow that in the trial, and the [c]ourt did not allow it because they didn't have a certified conviction and the [c]ourt has allowed this over [the D]efendant's objection in as proof in sentencing.

Based upon the Defendant's record of a prior DUI, and the lack of candor found by the trial court, we conclude that the trial judge acted within her discretionary authority in ordering the Defendant to serve four months of his sentence incarcerated.

CONCLUSION

Based upon the foregoing reasons and authorities, we affirm the judgments of the trial court.

DAVID H. WELLES, JUDGE

[4] We do agree with the State that the Defendant has failed to cite to the record or any relevant authority in support of this argument. See Tenn. Ct. Crim. App. R. 10(b). Notwithstanding waiver, we will address the Defendant's sentencing issue.